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Nos. 00-1751, 00-1777, 00-1779.

SUSAN TAVE ZELMAN, *et al.*,
Petitioners,
v.
DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1] The Becket Fund is a nonpartisan, interfaith, public-interest law firm, whose mission is to defend the free speech and religious freedom rights of Americans of all faith traditions.

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[1]All parties have consented to the filing of this brief. Consent letters from all parties are being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

Amicus submits this brief to attempt to correct what we believe is a misreading of historical events of the 19th Century that long has colored analyses of aid to religious primary and secondary schools. This *amicus* brief traces the 19th Century efforts to bar aid to "sectarian" schools, which, we will demonstrate, were not based on fair-minded debates over the proper separation of church and state, but rather were the result of anti-Catholic and anti-immigrant nativism and a desire to preserve the Protestant character of the public schools.[2] In light of this history, this *amicus* brief argues that this Court should not treat primary and secondary school aid as a special analytical category, as it has frequently done, but instead should look at this case under general Establishment Clause principles. This brief is thus similar in certain respects to the brief *Amicus* submitted in *Mitchell v. Helms*, 530 U.S. 793 (2000) (available at www.becketfund.org/litigate/mitchell.pdf), which traced the history of the concept of barring aid to "pervasively sectarian" institutions back to similar unfirm foundations.

SUMMARY OF THE ARGUMENT

Petitioners and other *amici* undoubtedly will address fully how the program at issue in this case should be upheld on the grounds that it involves the same principle that led to this Court upholding the aid in *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993). In a nutshell, the Ohio program does

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[2]In *Boyette v. Galvin*, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998), *amicus* represents parents challenging Massachusetts' 1854 "Anti-Aid" Amendment to its constitution, adopted at the height of the anti-Catholic and nativist "Know-Nothing" movement, on the grounds that it was based on irrational animus and violates our clients' Equal Protection and First Amendment rights.

Dist., 509 U.S. 1 (1993). In a nutshell, the Ohio program does not "define its recipients by reference to religion," *Agostini v. Felton*, 521 U.S. 203, 234 (1997), and "[a]ny aid provided under [the Ohio] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 488.

This brief addresses a different issue. *Amicus* urges this Court to reject the argument that money flowing to religiously affiliated or oriented primary and secondary schools constitutes a separate analytical category under the Establishment Clause. While some of this Court's direct-aid opinions, separate opinions of Justices, and various commentators have viewed monetary aid for education at primary and secondary religious schools as being especially suspect, this concept in the law does not have its origins in well-meaning theories of how best to maintain the proper separation of church and state. Rather, this practice of treating aid to lower schools as a unique Establishment Clause problem has its origin in the nativist and anti-Catholic bigotry of the 19th and early 20th Century. In short, it flowed not from the 18th Century thought of Madison and Jefferson, but from the fears and prejudices of later generations.

There is a popular narrative, though, that looks to the debates over aid to religious primary and secondary schools in the 19th Century as a basis for arguing that such aid should be treated as a special species of Establishment Clause problem today. This notion is traceable to the separate opinion of Justice Frankfurter in *McCollum v. Board of Education*, 333 U.S. 203 (1948), and the separate opinion of Justice Brennan in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which describe the battles over aid to religious schools and the subsequent determination, engrafted onto the constitutions of most states, to bar aid to "sectarian" schools. Both Justices cited this as the development

of a consensus that "prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people." *McCollum*, 333 U.S. at 215 (Frankfurter, J., concurring); *see also Lemon*, 403 U.S. at 648 (Brennan, J., concurring) ("[F]or more than a century, the consensus . . . has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions."). As recently as two terms ago Justices of this Court have relied on this historical narrative. *See Mitchell v. Helms*, 530 U.S. 793, 872 (2000) (Souter, J., joined by Stevens and Ginsburg, JJ.) (citing opinions of Justices Brennan and Frankfurter and stating that the turmoil over government establishments "in our own history . . . has led to a rejection of the idea that government should subsidize religious education.").

But as this brief will show, this narrative was based on the failure of Justices Brennan and Frankfurter to recognize that "nonsectarian" in the historical sources they cited was not a synonym for "secular." In the 19th Century school debates, keeping the common schools "nonsectarian" essentially meant keeping them non-Catholic. Indeed, "nonsectarian" was understood to allow the public schools to include a form of nondenominational Protestantism that relied on individual interpretation of the Bible. Moreover, constitutional amendments adopted in a majority of states that barred aid to "sectarian" schools, known as Blaine Amendments, were in fact the product of organized nativist efforts to preserve the Protestant character of the "nonsectarian" public schools and to suppress the cultural threat posed by the growth of Catholic "sectarian" schools.

Part I of this *amicus* brief traces the development of the popular myth that the 19th Century controversies over primary and secondary "sectarian" aid grew out of laudable concerns for the separation of church and state, and the adoption of that myth

in this Court's jurisprudence. Part II seeks to lay out for this Court a more accurate picture of the period. Part III urges this Court to analyze this case under general Establishment Clause principles, without the anachronistic baggage of viewing aid to primary and secondary schools as a separate analytical category. *Amicus* agrees with the conclusion of Professor Douglas Laycock that "we should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43, 53 (1997).

ARGUMENT

I. THE SPECIAL TREATMENT OF PRIMARY AND SECONDARY SCHOOLS ARTICULATED IN SOME OF THIS COURT'S ESTABLISHMENT CLAUSE CASES IS UNSOUND AND OWES MORE TO BYGONE PREJUDICES AND FEARS THAN TO THE COMMANDS OF THE FIRST AMENDMENT.

A. This Court Has Often Treated Aid Involving Primary and Secondary Schools as a Special Analytical Category.

There is, as this Court has recognized repeatedly, a fundamental difference between financial aid provided directly by the government to religious schools and aid that reaches such schools only indirectly, through the private choices of those who receive benefits through public-welfare programs. This Court's cases teach that an individual's own choice to use funds received through religion-neutral programs to send her child to a religious school simply does not unconstitutionally "establish" or "endorse" religion. *See, e.g., Mueller v. Allen*,

463 U.S. 388 (1983) (upholding tax deduction for educational expenses despite majority of beneficiaries using benefit for religious school expenses); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 488 (1986) (upholding blind man's use of vocational training funds to attend religious seminary since "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients,"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (upholding government payment of interpreter for deaf child attending religious school since the "interpreter will be present in a sectarian school only as a result of the private decision of individual parents.").

Nonetheless, Respondents and their *amici* likely will attempt to distinguish these three cases on the grounds that *Witters* involved higher education, that *Zobrest* involved in-kind aid, and that *Mueller* involved tax deductions, while the Cleveland Pilot Project Scholarship Program involves money from the public fisc winding up in the checking accounts of religiously affiliated or oriented primary and secondary schools. Such attempts should fail.

It is true, of course, that courts and commentators have often suggested that primary and secondary schools are, for Establishment Clause purposes *sui generis*.[3] For example, the

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[3]*See, e.g.*, Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement, and Church Autonomy*, 75 MARQ. L. REV. 903, 921-22 (1992); Julie K. Underwood, *Changing Establishment Analysis Within and Outside the Context of Education*, 33 HOW. L.J. 53, 56 (1990); Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513, 561-62 (1968); *see also* Michael J. Perry,

"divisiveness" doctrine—which appears now to have been abandoned by this Court[4]—was not focused on political divisiveness generally, but instead on the particularly worrisome divisiveness that was thought to attend financial aid to religious primary and secondary religious schools. *See, e.g., Mueller v. Allen*, 463 U.S. at 403 n.11 (divisiveness inquiry is "confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools."); *Roemer v. Board of Pub. Works of Md.*, 426 U.S. 736, 765-66 (1976) ("divisiveness" principle not applied in higher-education context); *Tilton v. Richardson*, 408 U.S. 672, 688-89 (1971) (same).

In a similar vein, the dissenting Justices in *Mitchell* noted that "two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools." 530 U.S. at 885. Monetary aid is likewise a ground for distinction recognized by the Court. In *Agostini*, the Court stressed that "[n]o Title I funds ever reach the coffers of religious schools." 521 U.S. at 228-29.

As we will show, though, heightened suspicion directed toward monetary aid involving religious primary and secondary

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Freedom of Religion in the United States: Fin de Siecle Sketches, 75 IND. L.J. 295, 321 n.83 (2000) (observing, but disagreeing with, special treatment of primary and secondary education in the Establishment Clause context); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 342-47 (1999) (same).

[4] *See, e.g., Mitchell*, 530 U.S. at 825 ("the dissent resurrects the concern for political divisiveness that once occupied the Court but that post-Aguilar cases have rightly disregarded"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor J., dissenting).

schools—and toward the instruction they provide—is rooted not in the tolerant pluralism of Madison, but instead in a later generation's shameful nativism and prejudice.

B. This Court's Treatment of Aid to Students in Primary and Secondary Religious Schools as an Especially Suspect Category of Aid is Rooted in an Erroneous Historical Narrative.

An early and influential effort to justify the special judicial attention directed at primary and secondary religious schools and their students is Justice Brennan's concurrence in *Lemon v. Kurtzman*. There, he insisted that the case required an examination of "the history of public subsidy of sectarian schools, and the purposes and operation of these particular statutes." *Lemon*, 403 U.S. at 644. He then proceeded to describe the school-funding crisis that rocked New York City in the early 1840's, and how 35 States, responding in the second half of the 19th Century to "widespread demands throughout the States for *secular public education*," enacted constitutional provisions barring aid to religious schools. *Id.* at 647 (emphasis added). In this respect, Justice Brennan followed the trail blazed by Justice Frankfurter in his concurrence in *McCollum*:

> In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught. In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict. The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of

> furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.

333 U.S. at 214-15 (notes omitted). And, moving forward in time, the historical narrative embraced by Justices Brennan and Frankfurter was endorsed recently by the dissenting Justices in *Mitchell*. *See* 530 U.S. at 872 (Souter, J., joined by Stevens and Ginsburg, JJ.) (citing opinions of Justices Brennan and Frankfurter and stating that the turmoil of government establishments "in our own history . . . has led to a rejection of the idea that government should subsidize religious education.").

But Justice Brennan failed entirely to appreciate that, in the historical works on which he relied, "nonsectarian" was not a synonym for "secular." Rather, "nonsectarian" had a very different, specific meaning. It denoted, even according to the historians Justice Brennan cites, a form of nondenominational Protestantism relying on individual interpretation of the Bible.[5]

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[5]For example, one of the historical works Justice Brennan cites, R. FREEMAN BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION (1950), explains that educators in the first half of the 19th Century "came to the conclusion that moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception." *Id.* at 117. This included "reading of the Bible as containing the common elements of Christian morals but reading it with no comment in order not to introduce sectarian biases." *Id.* When Catholic immigrants grew in numbers throughout the nation, Butts reports, "they soon raised the objection that what seemed to be 'non-sectarian' to Protestants was actually 'sectarian' to Catholics." *Id.* at 118.

This oversight led Justice Brennan to misunderstand the controversy that arose in New York City when Catholics, seeking a portion of the state common school fund for parochial schools, "contend[ed] that the [city] council was subsidizing sectarian books and instruction" in the various New York City schools supported by state funds. 403 U.S. at 646. After noting that the Scotch Presbyterian and Jewish communities also sought funding for their schools, *id.*, Justice Brennan stated:

> Although the Public School Society undertook to revise its texts to meet the objections, in 1842, the state legislature closed the bitter controversy by enacting a law that established a City Board of Education to set up free public schools, prohibited the distribution of public funds to sectarian schools, and prohibited the teaching

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Similarly, 2 ANSON STOKES, CHURCH AND STATE IN THE UNITED STATES (1950), another work heavily relied on by Justice Brennan, discusses educator Horace Mann's similar understanding of the term "nonsectarian." *Id.* at 55-56. Stokes quotes Mann's report to the Board of Education in 1848, which reveals the point well:

> [S]ectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools . . . . Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.

Id. at 57.

of sectarian doctrine in any public school.

Id.

Again, though, "sectarian" and "nonsectarian," had a specific meaning in the context of these debates, and "nonsectarian" was by no means a synonym for "secular." Instead, it meant non-denominational Protestantism. This fact is illustrated nicely in the Public School Society's proposed "textbook revisions"[6] that Justice Brennan reports failed to resolve the matter. After a series of fruitless meetings over proposed changes, the Public School Society's trustees expressed their frustration that, to the Catholics, "[e]ven the Holy Scriptures are sectarian and dangerous 'without note or comment'; and certainly no comments would be acceptable other than those of their own church." DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 50 (1974).

Moreover, the state legislature did not really "close[ ] the bitter controversy," as Justice Brennan reported—it simply handed victory to one side. The first Board of Education, elected after the school controversy was supposedly settled, hired a prominent nativist as Superintendent of Education, and the schools included daily readings from the Protestant Bible. *Id.* at 80. Catholics objected, but the Board ruled that reading the Bible "without note or comment" did not constitute

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[6]Catholics objected, for example, to textbooks describing Martin Luther as "the great reformer. . . . The cause of learning, of religion, and of civil liberty, is indebted to him, more than any man since the Apostles," and to others with passages openly disparaging "Popery." DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973, at 52 (1974).

sectarianism. *Id.*

After the New York controversy was concluded, Justice Brennan reported, "[t]he Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing urbanization soon lead to widespread demands throughout the States for secular education." 403 U.S. at 646-47. As a result, by 1900, 35 states "had added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools." *Id.* at 647. He cites a number of cases applying these laws, and declares, in support of striking down the aid at issue in *Lemon*:

> Thus for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions.

Id. at 648-49.

Amicus respectfully submits that Justice Brennan's account of these 19th Century developments is—like his presentation of the New York City crisis—inadequate and incomplete. The same is true of Justice Frankfurter's conclusion in his *McCollum* concurrence, reflecting on the efforts in New York and Massachusetts to keep their common schools "nonsectarian," that "long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people." *McCollum*, 333 U.S. at 215.

Unfortunately, these accounts and the popular narrative that they helped create, *see, e.g., Mitchell*, 530 U.S. at 872

(Souter, J., dissenting), place a benign separationist veneer over what the 19th Century state constitutional enactments really were: an effort to suppress Catholic schools and preserve Protestant hegemony generally, and the Protestant character of the public schools particularly. Because the history of barring public funds for sectarian schools during this period is, as Professor Douglas Laycock has stated, "the source of the legal tradition that treats school funding as an especially important issue in the separation of church and state," Laycock, *supra*, at 50, an accurate understanding of that history is critical.

This *amicus* brief seeks to lay out this history for the Court and show that what moved the states to bar aid to "sectarian" schools were not lofty principles of religious liberty, but instead various recurrent strains of anti-Catholic bigotry and an effort to ensure that public schools could continue to teach the supposedly "nonsectarian" common Protestant religion. *Amicus* does this not to score debater's points, or to construct a history of grievance, but to urge this Court to view the Cleveland school choice program through a lens unclouded by anachronistic biases and shoddy history. Correctly understood, nothing in the Establishment Clause requires this Court to reserve particular suspicion for religious primary and secondary schools. Again, following Professor Laycock, we urge this court to agree that "Americans today should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions." *Id.* at 53.

C. The Special Treatment of Aid to Primary and Secondary Religious Schools in the Nineteenth Century was a Manifestation of Nativist Bigotry and an Effort to Maintain the Nondenominational Protestant Character of the Public Schools.

1. Nineteenth Century "Common Schools" Inculcated Students with the Protestant "Common Religion," Thus Distinguishing Themselves from "Sectarian" Schools.

In the northeast States, the birthplace of the "common school," there was an ongoing religious debate in the 19th Century between the Unitarian and Orthodox divisions of the Congregational faith. *See, e.g., Hale v. Everett*, 53 N.H. 9, 111 (1868) ("the great mass of our people . . . were Congregationalists . . . . Such was their Christianity and their Protestantism, as was that of most of the New England states"). *See also The Dublin Case*, 38 N.H. 459 (1859) (describing the history of the Congregational Church and the conflicts between the Unitarians and Trinitarian/Orthodox in New England). A desire to make peace between these factions, together with the emerging principle of universal education, led to the creation of "nonsectarian common schools," first in Massachusetts and then elsewhere.

But "nonsectarian" in this sense did not mean nonreligious. The term referred to schools that taught religious doctrine acceptable initially to all Congregationalists, and, later, to most Protestants.[7] When Horace Mann developed his system

[7]"Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants." *Hale*, 53 N.H. at 111 (quoting 2 BANCROFT'S

of common, nonsectarian schools, the conflict he addressed was that between Orthodox and Unitarian Congregationalists.[8] E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN

HIST. U.S. 456). *See also Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 589 (1898) ("Christianity is part of the common law of this State [Pennsylvania]"); *Warde v. Manchester*, 56 N.H. 508, 509 (1876) ("[T]he protestant religion is regarded with peculiar favor . . . .").

[8]Responding to the charges that he sought the removal of religion, and the Bible in particular, from the common schools, Mann issued a statement on "Religious Education" in his Report on Education for 1848:

> But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education. Both these propositions I regard as eternal and immutable truths.

HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848, at 292 (1891). Thus, the "Father of Public Education" himself vehemently denied that he "ever attempted to exclude religious instruction from school, or to exclude the Bible from school, or to impair the force of that volume." *Id.* at 311. Instead, he describes the public school system at that time as building "its morals on the basis of religion; it welcomes the religion of the Bible." *Id. See also* note 5, *supra*. Mann welcomed religion in the common schools—so long as it was of the "common," "non-sectarian" variety.

266 (1937); *see also* R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

The New York Public School Society's inability to appreciate Catholics' objections to required readings, without note or comment, of the "nonsectarian" King James Bible reflected a similar understanding. Indeed, during this period, even Justices of this Court defined "sectarian" with reference to a benchmark of nondenominational Protestantism. In *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), Justice Story asked rhetorically, in response to the assertion that Christianity could not to be taught by laymen in a college:

> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian*, upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? .... Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?

Id. at 200 (emphasis added). Thus, the Court took for granted the proposition that, in 1844, the "common religion" was not sectarian. Other religions were.

2. Nativist Hostility to Irish and East-European Immigrants and Their Religions Produced Fierce, Organized Opposition to "Sectarian" Schools.

The common-school movement coincided with a surge in Irish, German, and other European Catholic and Jewish immigrants, and a corresponding backlash—one that lasted well into the 20th Century—against those immigrants and their religions. This backlash formed the basis of organized nativist movements that thrived on Protestant fears of the immigrants' cultures and faiths.

One of the earliest and most prominent nativist groups was the Know-Nothing party, which "included in its platform daily Bible reading in the schools." *Lemon*, 403 U.S. at 629 (citation omitted). Abraham Lincoln wrote of that party:

> As a nation we began by declaring that 'all men are created equal.' We now practically read it, 'all men are created equal, except Negroes.' When the Know-Nothings get control, it will read 'all men are created equal except Negroes and foreigners and Catholics.' When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty.

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

This was not a fringe movement. In Massachusetts, the elections of 1854 swept the Know-Nothing party into power. Know-Nothings won the governorship, the entire congressional delegation, all forty seats in the Senate, and all but 3 of the 379 members of the House of Representatives. JOHN R. MULKERN,

THE KNOW-NOTHING PARTY IN MASSACHUSETTS 76 (1990). Armed with this overwhelming mandate, they turned quickly to what Governor Henry J. Gardner called the mission to "Americanize America." *Id.* at 94. The Know-Nothings required the reading of the King James Bible in all "common" schools; they proposed constitutional amendments (which passed both houses of the legislature) that "would have deprived Roman Catholics of their right to hold public office and restricted office and the suffrage to male citizens who had resided in the country for no less than twenty-one years"; they dismissed Irish state-government workers; and they banned foreign-language instruction in the public schools. *Id.* at 102. The official bigotry is perhaps best—and comically—illustrated by the removal of a Latin inscription above the House Speaker's desk and the establishment by the legislature of a "Joint Special Committee on the Inspection of Nunneries and Convents." *Id.* at 102-103. This Committee was charged with the task of liberating women thought to be captive in convents and stamping out other "acts of villainy, injustice, and wrong . . . perpetrated with impunity within the walls of said institutions." *Id.* at 103.

Of particular interest here is the fact that the Know-Nothings also succeeded in adding an amendment to the Massachusetts Constitution which had been proposed and narrowly rejected by the people one year before: "[M]oneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools . . . shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." MASS. CONST. amend. art. XVIII (superseded by MASS. CONST. amend. art. XLVI). *See* MULKERN, *supra* at 54-56, 79, 105-106. The amendment's proponents were open about their motives:

> Sir, I want all our children, the children of our

> Catholic and Protestant population, to be educated together in our public schools. And if gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation. I am ready and disposed to say to our Catholic fellow-citizens: "You may come here and meet us on the broad principles of civil and religious liberty, but if you cannot meet us upon this common ground, we do not ask you to come."

OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. II, at 630 (Mr. Lothrop). Yet this very provision—unquestionably the product of prejudice—was among the 19th Century enactments cited approvingly by Justice Brennan as representing the "consensus . . . that public subsidy of sectarian schools constitutes an impermissible involvement of secular with religious institutions."[9]

Nor were nativist sentiments and outbursts confined to Massachusetts. The understanding of "nonsectarianism" as "lowest common denominator" Protestantism also led, for example, to a telling battle in Cincinnati between the "common

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[9] *Lemon*, 403 U.S. at 648-49 & n.7. Ironically, it was acknowledged in a source on which Justice Brennan relied that the anti-aid amendment in Massachusetts was the result of the "fanaticism" of the Know-Nothings, who "sought to abolish the Catholic school, force the children to attend public school, [and] use the Protestant Bible as a reader." BURTON CONFREY, SECULARISM IN AMERICAN EDUCATION: ITS HISTORY 141 n.69 (1931).

religionists" and a group of Catholics, Jews, and freethinkers that opposed Protestant devotional Bible reading. *See Board of Educ. v. Minor*, 23 Ohio St. 211 (1872). Protestant opposition to the removal of "their" Bible from the public schools was fierce and virulently anti-Catholic. *See* MICHAELSEN, *supra* at 118 ("[T]he Dutch Reformed *Christian Intelligencer* denounced the Cincinnati board's action as a move to 'hand the public schools over to Pope, Pagan, and Satan.'").

Nothing, though, refutes the claim that the common-school movement serves as a separationist model for church-state relations as decisively as does the history of the enactment and enforcement of the state "Blaine Amendments." Blaine Amendments take their name from Representative James G. Blaine, who in 1875, introduced in the U.S. House of Representatives a proposed constitutional amendment that would have barred states from giving school funds to sectarian schools.[10] There were no illusions about the purpose of such amendments. As this Court stated in *Mitchell*: "Consideration

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[10]LLOYD JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925, at 138-139 (1987). The amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id.

of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" 120 S. Ct. at 2551 (plurality opinion); *see also Kotterman v. Killian*, 972 P.2d 606, 624 (Az. 1999) ("[C]ontemporary sources labeled the amendment part of a plan to institute a general war against the Catholic Church.") (citation omitted).

After Blaine's Amendment barely failed in the Congress,[11] state after state either voluntarily adopted similar "Blaine Amendments" to their constitutions,[12] or were forced by Congress to enact such Articles as a condition of their admittance into the Union.[13]

Many prominent people threw their weight behind the effort. In 1875, President Grant spoke of the Catholic Church as a source of "superstition, ambition and ignorance." President

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[11]The measure passed the House 180-7 but fell four votes short of the Senate. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992).

[12]*See, e.g.*, N.Y. CONST. ART. XI § 3 (adopted 1894); DEL. CONST. ART. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. ART. IX § 8 (adopted 1875).

[13]*See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling legislation for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); S.D. CONST. art. VIII § 16; N.D. CONST. art. 8, § 5; MONT. CONST. art. X § 6; WASH. CONST. arts. IX § 4, art. I § 11; ARIZ. CONST. art. IX § 10; IDAHO CONST. art. X § 5.

Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, *supra*, at 51). Institutions were formed to fight Catholic interference with the Protestant public school system. *See, e.g., Derry Council, No. 40, Junior Order United American Mechanics v. State Council of Penn.*, 47 A. 208, 209 (Pa. 1900) (among purposes of the Junior Order of United American Mechanics were "to maintain the public-school system of the United States, and to prevent sectarian interference therewith; to uphold the reading of the Holy Bible therein"). A succession of anti-Catholic organizations continued efforts to oppose Catholic education and influence using the various tools of the state legislature, Congress, and the judiciary. In the 1890s, the "American Protective Association" was politically successful in inciting anti-Catholic hatred.[14]

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[14]Oath No. Four of the APA began:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH

3. Nineteenth and Early Twentieth Century State Court Litigation Reinforced the Distinction Between "Common" and "Sectarian" Schools.

The Blaine Amendments resulted in a wave of state-court litigation firmly establishing the notion that Catholic "sectarian" schools were unable to share in neutral education programs benefiting the "common" schools. Blaine Amendments, and other Blaine-like provisions, were frequently used to strike down programs such as payment for orphans at a Catholic asylum, *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), payment for tuition at an "industrial school for girls," *Cook Cy. v. Chicago Indus. Sch. for Girls*, 18 N.E. 183 (Ill. 1888), and provision of textbooks and other supplies for parochial school students, *Smith v. Donahue*, 195 N.Y.S. 715 (N.Y. App. Div. 1922).

When Catholic children attending public schools complained about the Protestant doctrine taught there, their charges went unanswered by the courts. While the Catholic Church forbade its faithful from reading the King James version of the Bible,[15] courts continued to hold that the reading of that

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36 (1912); *See also* KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964).

[15]As the California Supreme Court described the religious differences between the King James (Protestant) and Douai (Catholic) versions of the Bible:

> The Douai version is based upon the text of the Latin Vulgate, the King James version on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douai version incorporates the Apocrypha,

translation was *not* sectarian instruction.[16] *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927) ("It is said that King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so."), *overruled by Conrad v. City of Denver*, 656 P.2d 662 (Colo. 1983).

Other courts were candid about their intent to keep Protestant religious instruction in the public schools, and "sectarian" ideas out:

> The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship, and so his children are compelled to attend a place of worship, and he, as a tax-

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> which are omitted from the texts of the Testaments in the King James version.

Evans v. Selma Union High School Dist., 222 P. 801, 802-03 (Cal. 1924). *See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 350-53 (S.D. 1929) (discussing conflict between Catholics and Protestants over Bible reading); *People ex rel. Ring v. Board of Educ. of Dist. 24*, 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

[16]The Bible was, of course, widely read for devotional purposes, not simply used for its literary or historical merit, as it is today in some public schools. *See State ex rel. Finger v. Weedman*, 226 N.W. 348 (S.D. 1929) ("[W]e emphasize that in our opinion the reading of the Bible and repeating of the Lord's Prayer without comment in opening exercises is necessarily devotional.").

payer, is compelled to pay taxes for building and repairing a place of worship.

. . . . The object of the provision [IOWA CONST. art. 1, § 3], we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship.

. . . . Possibly, the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission.

Moore v. Monroe, 20 N.W. 475, 475-76 (Iowa 1884).[17] *See also Kaplan v. Indep. Sch. Dist.*, 214 N.W. 18, 20 (Minn. 1927) (upholding Bible reading, and adding, "[w]e are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded.").

The claims of a group of Catholics and Jews against a public school board that conducted religious exercises, including the reading of the King James Bible and recitation of the Lord's Prayer, were dismissed when the Texas Supreme Court held that such exercises did not render the school

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[17] Ironically, in a later decision, the Iowa Supreme Court enjoined a school district from providing funds to a public school operating in the same building as a Catholic parochial school—while explicitly reaffirming its decision in *Moore*. *Knowlton v. Baumhover*, 166 N.W. 202, 214 (Iowa 1918).

sectarian. *Church v. Bullock*, 109 S.W. 115, 118 (Tex. 1908) ("Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy.").

The Kansas Supreme Court justified its holding that the reading of the Lord's Prayer[18] and the Twenty-Third Psalm did not constitute "sectarian or religious doctrine" by arguing that the public schools had an obligation to teach morals and ideals to its students, and "the noblest ideals of moral character are found in the Bible." *Billard v. Board of Educ.*, 76 P. 422, 423 (Kan. 1904).

Similarly, daily religious services at a Methodist College were held by the Kentucky Court of Appeals not to constitute "sectarian instruction." *Commonwealth v. Board of Educ. of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915). *See also Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792, 793 (Ky. 1905). The Nebraska courts also applied the term "sectarian" to allow Protestant instruction in the public schools. *See State v. Scheve*, 93 N.W. 169, 172 (Neb. 1903) (overruling motion for rehearing) (constitutional prohibition

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[18]*See Ring*, 92 N.E. at 254 ("The Lord's Prayer is differently translated in the two versions."). *See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 351 (S.D. 1929) ("The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin.'").

against sectarian instruction "cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state."); *Tash v. Ludden*, 129 N.W. 417, 421 (Neb. 1911) ("This is a Christian country, Nebraska is a Christian state, and its normal schools are Christian schools; *not sectarian*, nor what would be termed religious schools; . . . .") (emphasis added).

Objecting students were not excused from the "nonsectarian" religious exercises. *See, e.g., McCormick v. Burt*, 95 Ill. 263 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); *Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866) (upholding student's "exclusion" from school for refusing to bow her head during public school prayer). *Cf. North v. Board of Trustees of Univ. of Illinois*, 27 N.E. 54 (Ill. 1891) (holding that mandatory chapel exercises, the avoidance of which resulted in the expulsion of the Plaintiff from the State university, did not violate the Illinois constitution).

In short, the common schools could be as religious as they wanted, so long as the religion in question was "common." It was only Catholic schools and others that deviated from the common religion that were denied aid.

* * *

Following the incorporation of the Religion Clauses against the States, this Court began examining whether state aid to religious schools and religious school students was constitutional under the First Amendment. The effort began in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), at a time when public schools with "nonsectarian" religious exercises were still

flourishing.[19] The rhetoric of challenging aid to "sectarian" schools—the prohibited category under state Blaine Amendments—was subsequently adopted, seemingly uncritically, into First Amendment jurisprudence. And with the concurrences of Justices Frankfurter and Brennan in *McCollum* and *Lemon*, this rhetoric was given a new pedigree. The origins of the idea that we should be particularly suspicious of aid to "sectarian" education were not merely forgotten, but a new narrative was constructed that put the finest gloss of principle over the ugly developments of the 19th Century.

II. THIS COURT SHOULD EXAMINE THE CLEVELAND SCHOOL-CHOICE PROGRAM AFRESH, UNENCUMBERED BY A POPULAR BUT FALSE NARRATIVE

The notion that the Nation's long history regarding monetary aid to primary and secondary "sectarian" schools counsels that such aid is an especially suspect Establishment Clause problem is, as has been demonstrated, a fundamentally flawed narrative. The history of the rise of the public schools and the 19th Century triumph of the no-aid-to-sectarian-schools concept in the passage and implementation of the Blaine

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[19]It is interesting that the challenged aid to parochial school students in *Everson* involved a program in New Jersey, the constitution of which had an Establishment-like Clause, a Conscience Clause and other provisions, but no Blaine Amendment or other similar anti-sectarian language in its constitution. Thus, in order to challenge the transportation program at issue, it was necessary for the plaintiffs in that case to urge upon the Court a federal prohibition against neutral aid on the grounds that the students receiving the aid attended a category of disqualified, *i.e.*, sectarian, schools.

Amendments simply cannot serve as the touchstone, or even a make-weight, for determining the constitutionality of school aid cases under the Establishment Clause. As *amicus* has demonstrated, these Blaine Amendments were enacted and implemented not out of broad-minded appeals to the first principles of the Establishment Clause, but rather out of anti-immigrant and anti-Catholic bigotry and the desire to preserve Protestant cultural hegemony through the public schools.

As Professor Ira Lupu has argued: "The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle." Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J. OF L., ETHICS & PUB. POL. 375, 386 (1999). Or as Professor Douglas Laycock has warned, we "should not unwittingly reason from a premise rooted in nineteenth century anti-Catholicism. We must think these questions out afresh, with no inherited presuppositions." Laycock, *supra*, at 53.

Amicus similarly urges this Court to analyze the Cleveland Pilot Scholarship Program "afresh," under the general principles it has articulated in its recent Establishment Clause jurisprudence. The popular narrative that justifies treating monetary aid to religious primary and secondary schools with singular suspicion is a false one—indeed the actual history is a shameful one—that should not encumber this Court's analysis of the aid at issue in this case.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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